

STATE OF MICHIGAN
COURT OF APPEALS

LINDA R. GRATE, LARRY GRATE and KENDRA
GRATE NELSON,

UNPUBLISHED
March 26, 1999

Plaintiffs-Appellees,

v

No. 206228
Kalamazoo Circuit Court
LC No. 96-000800 NI

TIMOTHY J. ENGLER,

Defendant-Appellant.

Before: O'Connell, P.J., and Jansen and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order granting in part and denying in part his motion for costs and fees pursuant to MCR 2.405. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant and plaintiffs Linda Grate and Kendra Nelson Grate were involved in an automobile accident. Plaintiffs filed suit seeking damages for claimed injuries. Larry Grate, Linda's husband, filed a derivative claim for loss of consortium.

A unanimous mediation evaluation recommended a joint award of \$40,000 for Linda and Larry Grate, and an award of \$15,000 for Kendra Grate Nelson. Plaintiffs accepted the awards, but defendant rejected them. Twenty-eight days before the scheduled trial date, defendant offered to stipulate to entry of judgment in the amount of \$18,000 for Linda Grate, and \$100 for Kendra Grate Nelson. Plaintiffs rejected the offers, and counteroffered with the mediation figures. Defendant rejected the counteroffers.

As defendant had admitted liability, the issue for trial was whether plaintiffs' injuries exceeded the no-fault threshold limit, and if so, what damages were appropriate. The jury returned a verdict in favor of defendant on all claims.

Defendant moved for costs and attorney fees under MCR 2.405. The trial court granted the motion as to costs, but denied it as to attorney fees. The court concluded that in the interest of justice,

attorney fees should not be awarded. MCR 2.405(D)(3). The court stated that its policy was to not award attorney fees if the party seeking fees had rejected a mediation award that had been accepted by the opposing party. The court observed that its policy was consistent with the court rule. MCR 2.405(E).

If a party rejects an offer of judgment and the adjusted verdict is more favorable to the offeror than the average offer, the offeror may recover actual costs from the offeree. MCR 2.405(D)(1). Actual costs are costs and fees taxable in a civil action, plus a reasonable attorney fee. MCR 2.405(A)(6). The trial court has discretion to determine a reasonable attorney fee. *Luidens v 63rd District Court*, 219 Mich App 24, 30-31; 555 NW2d 709 (1996). In the interest of justice, the trial court may refuse to award attorney fees. MCR 2.405(D)(3).

We affirm the circuit court's decision, notwithstanding its erroneous conclusion that the provisions in MCR 2.405(E) became effective July 1, 1997. The determination of what constitutes "the interest of justice" under MCR 2.405(D)(3) must be made on a case-by-case basis. *Stamp v Hagerman*, 181 Mich App 332, 339; 448 NW2d 849 (1989). Gamesmanship, or making an offer of judgment in order to gain a procedural advantage, is a relevant consideration for the trial court when determining whether attorney fees should be awarded under MCR 2.405. *Luidens, supra*, at 35. Here, defendant waited until twenty-eight days before trial, the deadline as provided in MCR 2.405(B), to put forth an offer of judgment. The offer of judgment of \$18,000 for Linda Grate was less than fifty percent of the mediation award of \$40,000. The offer of judgment of \$100 for Kendra Grate Nelson was less than one percent of the mediation award of \$15,000. The fact that defendant's offer of \$18,000 for Linda Grate had been made before suit was filed is evidence that the last-minute offer of an amount that had been consistently rejected constituted gamesmanship. Plaintiffs proceeded to trial after rejecting offers of judgment that were substantially below the unanimous mediation awards. Such circumstances have been found to support the denial of attorney fees under MCR 2.405(D)(3). *Stamp, supra*. No abuse of discretion occurred.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Jeffrey G. Collins